

## The Proposed Hague Convention on the Recognition and Enforcement of Civil Commercial Judgments: A Solution to Butch Reynolds's Jurisdiction and Enforcement Problems

Eric B. Fastiff

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### Recommended Citation

Fastiff, Eric B. (1995) "The Proposed Hague Convention on the Recognition and Enforcement of Civil Commercial Judgments: A Solution to Butch Reynolds's Jurisdiction and Enforcement Problems," *Cornell International Law Journal*: Vol. 28: Iss. 2, Article 7. Available at: <http://scholarship.law.cornell.edu/cilj/vol28/iss2/7>

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# NOTES

## The Proposed Hague Convention on the Recognition and Enforcement of Civil and Commercial Judgments: A Solution to Butch Reynolds's Jurisdiction and Enforcement Problems

*Eric B. Fastiff* \*

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<b>Introduction</b> .....	470
<b>I. The Proposed Hague Convention</b> .....	476
A. Types of Conventions .....	477
1. <i>Convention simple</i> .....	477
2. <i>Convention double</i> .....	478
B. The United States Proposal .....	479
1. <i>Contents of the United States Proposal</i> .....	480
a. The "White List" .....	480
b. The "Grey Area" .....	482
c. The "Black List" .....	483
d. Recognition and Enforcement Procedures .....	485
e. Effect on U.S. Law .....	485
2. <i>Current Status of Negotiations</i> .....	487
<b>II. Reynolds v. The International Amateur Athletic     Federation</b> .....	489
A. Background .....	489
B. Legal Action .....	489
1. <i>Reynolds I</i> .....	489
2. <i>Reynolds II</i> .....	490
3. <i>Enforcement/Garnishment</i> .....	491
4. <i>Reversal for Lack of Jurisdiction</i> .....	491

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<b>III. Could Reynolds Enforce Under the Proposed Hague Convention?</b>	493
A. Jurisdiction	494
B. Recognition and Enforcement	496
C. Punitive Damages	497
<b>Conclusion</b>	498

## Introduction

On May 5, 1992, the United States proposed that the Hague Conference on Private International Law draft a new convention regarding the recognition and enforcement of civil and commercial judgments.<sup>1</sup> The United States made the proposal because it is not a party to any bilateral or multilateral agreement governing such judgments.<sup>2</sup> As a result of this solitary

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1. The United States proposed that the Hague Conference on Private International Law [hereinafter Hague Conference] "resume work in the field of recognition and enforcement of judgments with a view to preparing a single convention to which Hague Conference Member States and other countries might become parties." Letter from Edwin D. Williamson, legal advisor of the U.S. Department of State, to Georges Droz, secretary general of The Hague Conference (May 5, 1992), Hague Conference Doc. No. L.c. ON No 15 (92).

The Hague Conference is a multilateral organization comprised of 39 member countries. Founded in 1893, it serves as a negotiating forum for civil and commercial legal matters. The United States became a member in 1964. 22 U.S.C. § 269(g) (1988). For a description of why the United States joined the Hague Conference, see *U.S. Participation in the Hague Conference and the Rome Institute: Hearing Before the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs*, 88th Cong., 1st Sess. on H.J. Res. 732 (1963) [hereinafter *Hearing*]. For further information on the Hague Conference, see Peter H. Pfund, *The Hague Conference Celebrates Its 100th Anniversary*, 28 TEX. INT'L L.J. 531 (1993); Peter H. Pfund, *International Unification of Private Law: A Report on United States Participation, 1985-1986*, 20 INT'L LAW. 623 (1986); Peter H. Pfund, *United States Participation in International Unification of Private Law*, 19 INT'L LAW. 505 (1985); and Comment, *The United States and the Hague Conferences on Private International Law*, 1 AM. J. COMP. L. 268 (1952).

2. The United States is a party to the New York Convention, a convention governing the recognition and enforcement of arbitral awards. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

There are several multilateral civil and commercial judgment treaties in force: The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1972 O.J. (L 299) 32, 29 I.L.M. 1413 (1990) (signed in 1968 and known as the Brussels Convention, it was amended three times to accommodate new European Union member-states as all European Union member-states are signatories) [hereinafter *Brussels Convention*]; The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1988 O.J. (L 319) 9, 28 I.L.M. 620 (1989) (signed in 1972 and known as the Lugano Convention, its signatories are the European Free Trade Association and European Union member-states) [hereinafter *Lugano Convention*]; The Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, OAS Treaty Ser. No. A/39, 24 I.L.M. 468 (1985) (signed in 1984, its signatories include most of the members of the Organization of American States) [hereinafter *Inter-American Convention*]; and Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971, available in CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, RECUEIL DES CONVENTIONS (1951-1988) 107 (1989) (drafted by the Hague Conference, it was signed only by the Netherlands, Portugal, and Cyprus)

approach to recognition and enforcement matters, U.S. litigants have a severe disadvantage in the global legal system. The U.S. federal and state judiciaries will enforce any judgment<sup>3</sup> that is valid and fair,<sup>4</sup> but foreign

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[hereinafter 1971 Hague Convention]. For details regarding these agreements, see *infra* part I.A. and note 32.

The United States and the United Kingdom initialed but did not sign a bilateral judgment treaty in 1976. See Convention Between the United Kingdom of Great Britain and Northern Ireland and the United States of America Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters (*Ad referendum* text), initialed Oct. 26, 1976, 16 I.L.M. 71 (1977) [hereinafter UK-US Convention]. The Convention was only initialed by its negotiators and never signed or ratified by the countries because of differences over the enforcement of large U.S. punitive damage awards. For a description of the Convention and an explanation of its failure, see David Luther Woodward, *Reciprocal Recognition and Enforcement of Civil Judgments in the United States, the United Kingdom and the European Economic Community*, 8 N.C.J. INT'L L. & COM. REG. 299, 310-14 (1983); Arthur Taylor von Mehren, *Recognition and Enforcement of Sister-State Judgments: Reflections on General Theory and Current Practice in the European Economic Community and the United States*, 81 COLUM. L. REV. 1044, 1060 n.61 (1981); and Peter Hay & Robert J. Walker, *The Proposed U.S.-U.K. Recognition-of-Judgments Convention: Another Perspective*, 18 VA. J. INT'L L. 753 (1978).

3. For the purpose of clarity, the term "judgment" includes both the recognition and enforcement of a final judicial determination, unless otherwise specified. There is a difference, procedurally, between recognition and enforcement:

A foreign judgment is recognized when a court concludes that a certain matter has already been decided by the judgment and therefore need not be litigated further. A foreign judgment is enforced when a party is accorded the relief to which the judgment entitles him. No foreign judgment can be enforced until it has been recognized, but in many cases, a party seeks only recognition, not enforcement, of a foreign judgment. For example, in a local action, a defendant may raise, as a partial or even a complete defense, a foreign judgment in his favor; likewise, he may rely upon a foreign judgment, such as a declaratory judgment or a determination of status, that does not itself entitle him to affirmative relief. The distinction between these terms is significant because foreign-country judgments usually cannot themselves be enforced directly in the United States, but first must be reduced to a judgment of a U.S. court. Thus, there may be situations in which U.S. courts will recognize a foreign judgment, in the sense that they will give effect to matters decided, but nonetheless will not grant, or will modify, the affirmative relief granted by the foreign court.

Robert B. von Mehren & Michael E. Patterson, *Recognition and Enforcement of Foreign Country Judgments in the United States*, 6 LAW & POL'Y INT'L BUS. 37, 38 (1974) (footnote omitted).

4. Both federal and state courts generally have followed the rule set by the U.S. Supreme Court in 1885 in *Hilton v. Guyot*, 159 U.S. 113 (1885). The Court held: [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.

*Id.* at 202-03.

Most states follow *Hilton* and have a common law comity approach to recognition and enforcement of foreign judgments. See, e.g., *Fredericks v. Eide-Kirschmann Ford*, 462 N.W.2d 164, 170 (N.D. 1990)

(When the enforcement of a judgment as a matter of comity is in issue, absent a showing of prejudice, fraud "or other special reason why comity of this nation should not allow it full effect, the merits of the case should not . . . be tried afresh . . . upon the mere assertion of the party that the judgment was erroneous in law or in fact.

(quoting *Hilton v. Guyot*, 159 U.S. at 202-03)); *Rotary Club v. Chaprales Ramos de Pena*, 160 Ariz. 362, 364 (1989) ("It is clear that the Arizona courts are not required to give full faith and credit to judgments of foreign nations.").

Some states, such as New York, rejected *Hilton* as controlling state recognition and enforcement. See *Johnston v. Compagnie Generale Transatlantique*, 242 N.Y. 381 (1926) (holding that *Hilton* is not controlling in New York. The recognition and enforcement of foreign judgments is a question of "private rather than public law," and New York courts "will recognize private rights acquired under foreign laws and the sufficiency of the evidence establishing such rights." *Id.* at 387).

New York, however, has since joined with 21 other states (Alaska, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Virginia, and Washington (and the Virgin Islands), UNIF. FOREIGN MONEY-JUDGMENTS ACT, 13 U.L.A. 261-75 (1986 & 1993 Supp. 51-59)) and enacted the Uniform Foreign Money-Judgments Recognition Act. N.Y. CIV. PRAC. L. & R. §§ 5301-5309 (McKinney 1978 and Supp. 1994). For more on the Act, see GARY B. BORN & DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 781-86 (2d ed. 1992).

There is no uniform federal and state law regarding the recognition and enforcement of foreign judgments because Congress has not exercised its authority to regulate such judgments. Congress has such authority by means of the commerce clause, which gives Congress the "[p]ower . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. By this clause,

Congress has no less authority over foreign commerce than it has over interstate commerce. And since the revolution initiated by [*NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)], . . . under the commerce power Congress can reach all interstate or foreign "intercourse"; [sic] it can reach matters precedent to or subsequent to interstate or foreign commerce; it can reach what relates to or affects as well as what is commerce; it can reach strictly local commerce and activities when necessary to make effective regulation of interstate or foreign commerce. The power of Congress over foreign commerce would then, of itself, support legislation equivalent to a large part of the law "enacted" by treaty. . . . For, generally, the law of the land enacted by the traditional treaties deals with the rights of aliens in the United States, and regulation of the rights of aliens in these respects would today, it appears, be held to be within congressional authority. . . . So, for example, Congress has assured that aliens, like citizens, shall be entitled "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all law and proceedings for the security of persons and property . . . and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Louis Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 915-16 (1959) (quoting The Civil Rights Act of 1870, 16 Stat. 144, 42 U.S.C. § 1981 (1952)) (footnotes omitted).

Congress has the means to regulate international trade by either statute or treaty. The treaty method originates in Article II, which ordains that the President "shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl. 2. The various Hague Conventions which the United States has signed and ratified are examples of Congress exercising its treaty power. Treaties, by means of the supremacy clause, have the effect of federal statutes: "[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. CONST. art. VI, cl. 2.

countries are reticent to enforce U.S. federal and state judgments.<sup>5</sup> Thus, foreign plaintiffs easily have their judgments satisfied against U.S. defendants, but U.S. plaintiffs are often left with empty judgments. The U.S. proposal to the Hague Conference was intended to end this unequal legal situation.

While the United States made its proposal to the Hague Conference, Harry L. (Butch) Reynolds, Jr. was fighting the International Amateur Athletic Federation (IAAF) and its U.S. representative, The Athletics Congress (TAC), for the right to compete in the 1992 United States Track and Field Olympic Trials, and eventually in the 1992 Barcelona Olympic Games.<sup>6</sup>

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The full faith and credit clause requires that states enforce the judgments of other states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1. Congress exercised its authority to facilitate the recognition and enforcement of sister-state judgments when in 1948 it revised Title 28, Judiciary and Judicial Procedure, and included § 1738. Act of June 25, 1948, ch. 646, 62 Stat. 947 (1948) (codified at 28 U.S.C. § 1738 (1988)).

Guyot, incidentally, lost. Although the Supreme Court found that he had a right to recognition and enforcement by means of international comity, 159 U.S. at 163-64, he could not require the exercise of that right because his country, France, refused to recognize and enforce U.S. judgments without a merit review. *Id.* at 227-28. Therefore, U.S. courts could, in the absence of a federal statute or treaty, cease to recognize and enforce foreign judgments at any time. See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 98, 100 (1988) and RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 (1987).

5. A famous example is Lord Reid's speech to the House of Lords during deliberations in *Broome v. Cassell & Co.*, [1972] App. Case 1027, 1087, 1 All E.R. 801, 835:

I think that the objections to allowing juries to go beyond compensatory damages are overwhelming. To allow pure punishment in this way contravenes almost every principle which has been evolved for the protection of offenders. There is no definition of the offence except that the conduct punished must be oppressive, high-handed, malicious, wanton or its like—terms far too vague to be admitted to any criminal code worthy of the name. There is no limit to the punishment except that it must not be unreasonable. The punishment is not inflicted by a judge who has experience and at least tries not to be influenced by emotion: it is inflicted by a jury without experience of law or punishment and often swayed by considerations which every judge would put out of his mind. And there is no effective appeal against sentence. All that a reviewing court can do is to quash the jury's decision if it thinks the punishment awarded is more than any twelve reasonable men could award. The court cannot substitute its own award. The punishment must then be decided by another jury and if they too award heavy punishment the court is virtually powerless. It is no excuse to say that we need not waste sympathy on people who behave outrageously. Are we wasting sympathy on vicious criminals when we insist on proper legal safeguards for them? The right to give punitive damages in certain cases is so firmly embedded in our law that only Parliament can remove it. But I must say that I am surprised by the enthusiasm of Lord Devlin's critics for this form of palm tree justice.

See also *infra* note 181 and accompanying text.

6. The International Amateur Athletic Federation (IAAF) is the international track and field governing organization: "The IAAF shall comprise duly elected national governing bodies for amateur athletics which agree to abide by the rules and regulations of the IAAF." Rule 2, The International Amateur Athletic Federation, INTERNATIONAL AMATEUR ATHLETIC FEDERATION, OFFICIAL HANDBOOK 1994-1995, at 37 (1994) [hereinafter IAAF OFFICIAL HANDBOOK]. The International Olympic Committee (IOC)

The IAAF barred Reynolds from competing for two years for failing an

recognizes the IAAF as the official track and field (known outside the U.S. as "athletics," hence International Amateur *Athletic* Federation) international governing body (called international federation or IF). See Rule 4, Recognition by the IOC, INTERNATIONAL OLYMPIC COMMITTEE, OLYMPIC CHARTER 14 (1992) [hereinafter OLYMPIC CHARTER] ("The IOC may recognize IFs according to the conditions laid down in Rule 29."); Rule 29, Recognition of the IFs, *id.* at 39

(In order to promote the Olympic Movement, the IOC may recognize as IFs international non-governmental organizations administering one or several sports at world level and encompassing organizations administering such sports at national level.

As far as the role of the IFs within the Olympic Movement is concerned, their statutes, practice and activities must be in conformity with the Olympic Charter. Subject to the foregoing, each IF maintains its independence and autonomy in the administration of its sport.);

Rule 30, Role [of the IFs], *id.*

1 The role of the IFs is to:

1.1 establish and enforce the rules concerning the practice of their respective sports and to ensure their application;

1.2 ensure the development of their sports throughout the world;

1.3 contribute to the achievement of the goals set out in the Olympic Charter;

1.4 establish their criteria of eligibility to enter the competitions of the Olympic Games in conformity with the Olympic Charter, and to submit these to the IOC for approval;

1.5 assume the responsibility for the technical control and direction of their sports at the Olympic Games and at Games under the patronage of the IOC;

1.6 provide technical assistance in the practical implementation of the Olympic Solidarity programme.

The IAAF was based in London until October, 1993 when it moved to Monte Carlo, Monaco. John Rodda, *Athletics: Staff Stunned as IAAF Decides to Leave London Offices*, GUARDIAN, Sept. 28, 1993, at 18.

All countries desiring to compete in the Olympics must have a National Olympic Committee (NOC). Rule 31(3), Mission and Role of the NOCs, OLYMPIC CHARTER, *supra*, at 41 ("The NOCs have the exclusive powers for the representation of their respective countries at the Olympic Games and at the regional, continental or world multi-sports competitions patronized by the IOC."). See also Chapter 4, The National Olympic Committees, *id.* at 41-48. The United States Olympic Committee (USOC) is the U.S. NOC. 36 U.S.C. §§ 371-395 (1988). See also UNITED STATES OLYMPIC COMMITTEE, UNITED STATES OLYMPIC COMMITTEE CONSTITUTION AND BYLAWS (1992) [hereinafter USOC CONSTITUTION].

Furthermore, every sport must have a national governing body, also known as a national federation. Rule 33, The National Federations, OLYMPIC CHARTER, *supra*, at 47 ("To be recognized by an NOC and accepted as a member of such NOC, a national federation must be affiliated to an IF recognized by the IOC and conduct its activities in compliance with both the Olympic Charter and the rules of its IF."). The IAAF, therefore, provides a means of membership for national governing bodies: "The national governing body for amateur athletics in any country or territory shall be eligible for Membership." Rule 4, Membership, IAAF OFFICIAL HANDBOOK, *supra*, at 38.

In the U.S., the USOC recognizes the national governing bodies. 36 U.S.C. § 391 (1988) ("For any sport which is included on the program of the Olympic Games[,] . . . [the USOC] is authorized to recognize as a national governing body an amateur sports organization which files an application and is eligible for such recognition . . ."). The USOC recognized The Athletics Congress (TAC) (renamed USA Track and Field on December 5, 1992. Jim Terhune, *New Name Doesn't Necessarily Rid TAC of Some Old Issues*, COURIER-JOURNAL, Dec. 6, 1992, at C11.) as the U.S. national governing body for track and field. Appendix—List of Members, Olympic and Pan-American Sport Organiza-

anti-doping steroid test in 1990.<sup>7</sup> Protesting his innocence, Reynolds fought his ban, which would prevent him from competing in the 1992 Barcelona Olympics, in the TAC, IAAF, and U.S. adjudicative fora.<sup>8</sup> Although Reynolds won the right to compete in the Olympic Trials,<sup>9</sup> he was defeated in the 400 meter run qualifying final.<sup>10</sup> The IAAF, which opposed Reynolds's competing in the Trials, extended his ban through 1992 to punish his disobedience.<sup>11</sup> Reynolds sued the IAAF in U.S. district court for contractual interference and won a \$27.3 million judgment.<sup>12</sup>

The IAAF refuses to recognize U.S. (or any country's) judicial jurisdiction,<sup>13</sup> and therefore, it refused to pay Reynolds.<sup>14</sup> Reynolds turned to garnishing the IAAF's U.S. sponsors' quarterly dues in order to satisfy the judgment.<sup>15</sup> Reynolds did not directly attempt to attach IAAF assets located outside the United States or to garnish its foreign sponsors' dues.

The IAAF did not appear in the district court adjudication.<sup>16</sup> It was forced to appeal on the only available ground: lack of jurisdiction. The Sixth Circuit agreed with the IAAF that the Federation was not subject to personal jurisdiction in Ohio, reversed the damages award, and dismissed the case.<sup>17</sup> The Sixth Circuit denied the motion to rehear the case en banc,<sup>18</sup> and the Supreme Court denied Reynolds's petition for

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tions, USOC CONSTITUTION, *supra*, at 54. The IAAF also recognized TAC as the official U.S. national governing body. List of Members, IAAF OFFICIAL HANDBOOK, *supra*, at 25.

7. *Reynolds Out of Money, Out of Races*, WASH. POST, Dec. 3, 1992, at B2.

8. *Id.* See *infra* part II and text accompanying footnotes 115-37. See also Vernon A. Nelson, Jr., Comment, *Butch Reynolds and the American Judicial System v. The International Amateur Athletic Federation—A Comment on the Need for Judicial Restraint*, 3 SETON HALL J. SPORT L. 173 (1993).

9. *Reynolds v. International Amateur Athletic Fed'n*, 841 F. Supp. 1444 (S.D. Ohio 1992) [hereinafter *Reynolds II*].

10. Reynolds placed fifth in the 400 meter final. Kenny Moore, *The Short Arm of the Law*, SPORTS ILLUS., July 6, 1992, at 98.

11. Tom Cushman, *Reynolds wraps up tale of IAAF persecution*, SAN DIEGO UNION-TRIB., Dec. 12, 1993, at C-1.

12. *Reynolds v. International Amateur Athletic Fed'n*, No. 92-00452 (S.D. Ohio Nov. 1992).

13. When Reynolds was suing the IAAF in order to compete in the Olympic Trials, IAAF President Primo Nebiolo said the IAAF "will never accept a decision of any court in the world against our rules." Moore, *supra* note 10. See also Jerry Kirshenbaum, ed., *Scorecard*, SPORTS ILLUS., July 26, 1993, at 9.

14. Asked whether the IAAF will pay Reynolds the award, IAAF President Primo Nebiolo replied, "Never, never. He can live 200 years." Jerry Kirshenbaum, *Kiss, Kiss*, SPORTS ILLUS., Sept. 6, 1993, at 21.

15. *Reynolds v. International Amateur Athletic Fed'n*, No. C-2-92-452 (S.D. Ohio Feb. 1993) (motion for garnishment). See also Andrew Blum, *Athlete Wins Round With Olympic Sponsors*, NAT'L L. J., Sept. 13, 1993, at 6.

16. See *Reynolds II*, 841 F. Supp. at 1447; *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110, 1113-14 (6th Cir. 1994) (The IAAF did not respond to Reynolds's complaint and TAC did not appear in the default proceedings. After the IAAF was given full notice, the court entered a default judgment in Reynolds's favor. Soon afterward, the district court held a hearing to determine damages. Again, the IAAF was provided notice but refused to appear.).

17. *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110 (6th Cir. 1994).

18. *Reynolds v. International Amateur Athletic Fed'n*, No. 93-3884, 1994 U.S. App. LEXIS 16815 (6th Cir. July 7, 1994).



certiorari.<sup>19</sup>

This Note analyzes how Reynolds could have exercised jurisdiction over the IAAF and enforced his judgment through the proposed Hague Convention had this new treaty been in force. First, this Note describes the U.S. proposal and the current status of negotiations. Second, this Note discusses the jurisdiction, garnishment, and enforcement aspects of the Reynolds suit. Finally, this Note analyzes whether Reynolds would have been able to use the proposed Hague Convention (had it been in force), and suggests areas that the United States must require the Hague Convention to include so as to guarantee jurisdiction and enforcement, both domestic and foreign, of a future *Reynolds*<sup>20</sup>-type decision.

Reynolds's case is an ideal case to use in analyzing the U.S. proposal. The IAAF is an unincorporated foreign juridical entity, claims judicial immunity,<sup>21</sup> has a U.S. agent, conducts operations in the United States, affects U.S. citizens, and affects them in a significant financial manner. The IAAF is the epitome of the foreign defendant which conducts substantial business in the United States but is able to avoid U.S. justice. The proposed Hague Convention must be drafted to ensure jurisdiction over the IAAF and enforcement of awards against it wherever the IAAF conducts business or retains assets. If the proposed Hague Convention can permit a court to assume jurisdiction and enforcement power over the IAAF, then such a court can assume those powers over virtually any duly-constituted corporation operating internationally. The exercise of such power is in every country's best interest.

## I. The Proposed Hague Convention

The impetus for the U.S. proposal arose from the isolated position the United States occupies in the global judgments scheme. The United States is not a party to any bilateral or multilateral treaty governing recognition and enforcement of civil and commercial judgments.<sup>22</sup> The contradictory situation of the liberal U.S. due process standards and foreign reluctance to enforce U.S. judgments results in a legal imbalance: the United States enforces almost all foreign judgments<sup>23</sup> but sees its judgments routinely rejected abroad. The increasing amount of international litigation concerning U.S. parties spurred the Department of State to suggest the Hague Conference prepare a treaty that would right the imbalance.<sup>24</sup> This part of the Note describes types of judgment agreements in

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19. *Reynolds v. International Amateur Athletic Fed'n*, 115 S. Ct. 423 (1994).

20. *Reynolds II*, 841 F. Supp. 1444 (S.D. Ohio 1992).

21. See Moore, *supra* note 10.

22. See *supra* note 2.

23. See *supra* note 4.

24. The United States chose to negotiate through the Hague Conference because its 39 members include the largest U.S. trading partners (the European Union and European Free Trade Association countries, as well as Canada, China, Israel, Japan, and Mexico). Furthermore, the Conference does not include states which are not only hostile to the United States, such as Iran, but which also have extremely different legal systems, such as Saudi Arabia. In that country, for example, the Board of Grievances

existence, current agreements in force as well as past attempts, and analyzes the U.S. proposal for a new convention.

### A. Types of Conventions

The civil and commercial judgment conventions negotiated thus far have been either *conventions simples* or *conventions doubles*. The purpose of a judgment agreement is to provide for regularity and thus ease of enforcement.<sup>25</sup> Such an agreement transcends different legal systems and national cultures; signatory countries may have to sacrifice laws or parts of their systems in order to reach an agreement. Thus, the agreements represent the common ground of signatory states' legal systems.

#### 1. *Convention simple*

A *convention simple* is a traditional type of judgment convention.<sup>26</sup> It addresses only recognition and enforcement. A judgment resting on a jurisdictional basis provided for in the convention is entitled to recognition and enforcement. If a court assumes jurisdiction on a basis not provided for in the convention, the enforcing court has the discretion whether to recognize the judgment or not.<sup>27</sup>

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"has the power to enforce foreign court judgments in commercial matters, so long as they do not contravene the basic tenets of Islam and the foreign country involved reciprocally enforces Saudi judgments." U.S. DEPARTMENT OF STATE, 1990 Human Rights Report, Saudi Arabia, U.S. DEPT. OF STATE DISPATCH, Feb. 1, 1991, at 7. Negotiating through the United Nations would have involved dealing with these counties, and the chances of achieving an acceptable treaty were essentially negligible.

25. See *Hearing*, *supra* note 1.

26. For information on the different types of judgment conventions, see Louis B. Sohn, General Information Form 109A, Dec. 11, 1992, American Bar Association Section of International Law and Practice (on file with the *Cornell International Law Journal*).

27. The 1971 Hague Convention, *supra* note 2, is a *convention simple*. Jurisdiction exists in the rendering forum if: this is the defendant's habitual residence (or is the place of incorporation or principal place of business); the defendant has a commercial presence; at issue is immovable property located in the forum; a tort occurred in the forum; the forum was chosen in a forum selection agreement; the defendant did not challenge jurisdiction; or the defendant was the plaintiff in a prior action regarding this issue in the forum. Art. 10, *id.*

The terms of recognition and enforcement are simple and strict:

A decision rendered in one of the Contracting States shall be entitled to recognition and enforcement in another Contracting State under the terms of this Convention—

- (1) if the decision was given by a court considered to have jurisdiction within the meaning of this Convention, and
- (2) if it is no longer subject to ordinary forms of review in the State of origin.

In addition, to be enforceable in the State addressed, a decision must be enforceable in the State of origin.

Art. 4, *id.*

This convention was negotiated under the auspices of the Hague Conference. Its only signatories are the Netherlands, Portugal, and Cyprus. The convention is not in force because these states did not execute the required bilateral accords. They did not do so because the Brussels Convention was completed almost simultaneously, and it essentially superseded the 1971 Hague Convention. The 1971 Hague Convention is not

## 2. *Convention double*

A *convention double* governs both the assumption of jurisdiction and the recognition and enforcement of the resulting judgment.<sup>28</sup> A "white list" details the acceptable jurisdiction bases.<sup>29</sup> A case resting on an accepted basis fulfills the convention's jurisdictional requirement for recognition and enforcement. In a narrow *convention double*, the white list bases are exclusive.

A broader *convention double* also contains a "black list" of prohibited jurisdictional bases.<sup>30</sup> If a rendering court does assume jurisdiction on a black list basis, the enforcing court must, however, still recognize and enforce the judgment because it is not allowed to review the rendering court's assumption of jurisdiction.<sup>31</sup> A broad convention thus permits contracting states to assume jurisdiction on bases not detailed in the white list.<sup>32</sup>

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suitable for amending as it limits itself to recognition and enforcement. Furthermore, it is doubtful that the United States would be able to reach bilateral agreements with all signatory countries.

The United States and the United Kingdom initialed a bilateral judgment treaty in 1976, the UK-US Convention, *supra* note 2, but never signed nor ratified the agreement. The convention failed even though punitive damages were excluded: "(2) . . . this Convention shall not apply to judgments: (b) to the extent that they are for punitive or multiple damages." Art. 2, *id.*

Jurisdiction in the UK-US Convention exists if: the defendant was the original plaintiff; the defendant's habitual residence (or principal place of business or incorporation) was within the rendering forum; the defendant had a branch office or other establishment (other than a subsidiary) in the forum and the action arises from this activity relating to the office; the forum was specified in a forum selection agreement; the action arises from the conduct of defendant's business in the forum; an advertisement was made in the forum regarding the supply of goods or services; if the action pertains to determining rights of ownership, if the object is located in the forum; the principal place of a trust's administration is the forum (or the trust specifies the forum) for actions regarding the trust; and a tort occurred in the forum. Art. 10, *id.*

Recognition and enforcement is as simple and as strict as in the 1971 Hague Convention:

- (1) A judgment . . . shall . . . be recognized . . . if:
  - (a) it was given by a court having jurisdiction under Articles 10 or 11; and
  - (b) it has binding effects within the territory of origin, notwithstanding that an application for review may be pending against it, or that it may still be subject to review, in that territory.

. . . .  
 Art. 4, *id.* (Article 11 pertains to counterclaims. Art. 11, *id.*).

The UK-US Convention excludes judgments "for punitive or multiple damages" and "determining questions relating to damage or injury resulting from a nuclear incident." Art. 2, *id.* These exclusions represent British nervousness regarding large U.S. tort awards; the United States had to exclude these areas in order to conclude the Convention. Even so, the British refused to sign and ratify the accord.

28. See Sohn, *supra* note 26, at 4, 7-8.

29. *Id.*

30. *Id.*

31. Art. 28, para. 3, Brussels Convention, *supra* note 2.

32. There are three *conventions doubles* currently in force. The first convention was the Brussels Convention. All European Union members must be a party to this treaty, and as a result it has been amended three times when the EC expanded its membership: for the United Kingdom, Denmark, and Ireland in 1978 (29 I.L.M. 1416 n.1) for

## B. The United States Proposal

The United States proposed that Hague Conference member states negotiate a novel agreement intended to "apply in civil and commercial matters whatever the nature of the court or tribunal."<sup>33</sup> The proposal<sup>34</sup> incorpo-

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Greece in 1982 (*id.*), and for Spain and Portugal in 1989 (*id.*). Article 220 of the Treaty of Rome required the founding EC countries to negotiate a judgment treaty. The Treaty of Rome Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3. Article 63 of the Brussels Convention requires new EC states "to accept this Convention as a basis for the negotiations between the Contracting States and that State necessary to ensure the implementation of the last paragraph of Article 220 of the Treaty establishing the European Economic Community." Art. 63, Brussels Convention, *supra* note 2. The Brussels Convention details permitted bases on which a rendering court may exercise jurisdiction. Arts. 2-10 contain the bases for jurisdiction. *Id.* The general rule regarding recognition is that the courts of one state are required to recognize the judgments of another member state, with very limited exceptions. Arts. 26-28, *id.*

United States defendants increasingly are finding themselves caught in the Brussels Convention's web of "exorbitant" jurisdiction. Although such jurisdiction is proscribed for member states' defendants, it is not for non-contracting state parties. Thus U.S. defendants are being forced to litigate, often unfairly, in a contracting state and see the judgment be enforced—as required—throughout the rest of the EC. The United States hopes to limit this "exorbitant jurisdiction" in the proposed Hague Convention.

The second *convention double* multilateral treaty mirrors the Brussels Convention. In 1988 the European Free Trade Association (EFTA) and the EC countries signed the Lugano Convention. *See supra* note 2. The Brussels and Lugano Conventions are essentially identical.

The current European situation is therefore that the Brussels Convention governs a dispute between EU parties and an EU party and a non-EU or non-EFTA party, and the Lugano Convention governs disputes between EU and EFTA parties, intra-EFTA parties, and between an EFTA party and a non-EU or non-EFTA party.

The third *convention double* is the Inter-American Convention. *See supra* note 2. Signed in 1984, its signatories include (most of the) members of the Organization of American States (OAS). Although the United States proposed that the OAS negotiate this treaty, it did not sign the convention.

33. Draft Convention On Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Title I (Scope), Art. 1 [hereinafter Draft Convention or United States proposal] (on file with the *Cornell International Law Journal*).

Article 1 continues:

It shall not extend, in particular, to revenue, customs or administrative matters.

The Convention shall not apply to:

1. the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
2. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
3. social security;
4. arbitration.

*Id.* This is the exact language used in the Brussels and Lugano Conventions. Art. 1, Brussels Convention, *supra* note 2; Art. 1, Lugano Convention, *supra* note 2.

34. The Draft Convention was prepared by the United States at the request of the Hague Conference but was required to be vague so as to not cause prejudices and disputes at the outset of discussions on whether to place the proposal on the Hague Conference's agenda. The introductory paragraph to the Draft Convention notes: "The structure and basic provisions of a Hague Convention dealing with recognition and enforcement should parallel, to the extent feasible, the Brussels and Lugano Conventions. The following draft is based on the Lugano Convention." Introductory paragraph, Draft Convention, *supra* note 33.

rates aspects of traditional judgment conventions but adds a special area intended to facilitate compromise and agreement. The proposal, which met with interest from the Hague Conference Permanent Bureau<sup>35</sup> and enthusiasm from a special expert working group,<sup>36</sup> encountered opposition at the 17th Hague Conference session.<sup>37</sup> The Europeans enjoy their dominant position in the status quo and appear reluctant to accept change.

### 1. Contents of the United States Proposal

The United States proposed a *convention mixte* (mixed convention), which includes provisions for both the assumption of jurisdiction and the requirements for recognition and enforcement.<sup>38</sup> "The United States considered that a mixed convention would improve the present situation but would not interfere with practices that States might consider necessary. For this reason [it] had chosen a 'mixed' convention as opposed to either a 'single' or 'double' convention."<sup>39</sup>

#### a. The "White List"

As in a *convention double*, a *convention mixte* contains a white list detailing specific grounds upon which a court may base its assumption of jurisdiction. If a court assumes jurisdiction pursuant to the white list, other contracting parties must accept that assumption of jurisdiction as valid and proceed to recognize and enforce the judgment.

The white list bases of jurisdiction are not specifically delineated in the Draft Convention. Using references to other Conventions in the draft, it is possible to outline three broad white list categories.

First, "persons domiciled in a Contracting State may, whatever their nationality, be sued in the courts of the jurisdiction in which they are domiciled."<sup>40</sup> This clause is standard jurisdiction language and can be found

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For a broad outline of the reasons for the proposal and the *convention mixte* format, see Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments, A New Approach for the Hague Convention?*, 57 LAW & CONTEMP. PROBS. 271 (1994). For a critique of von Mehren's idea, see Andreas F. Lowenfeld, *Thoughts About a Multinational Judgments Convention: A Reaction to the von Mehren Report*, 57 LAW & CONTEMP. PROBS. 289 (1994). For further commentary on the need for a global judgment treaty, see Matthew H. Adler, *If We Build It, Will They Come? The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments*, 26 LAW & POL'Y INT'L BUS. 79 (1989).

35. See Some reflections of the Permanent Bureau on a general convention on enforcement of judgments, Preliminary Document No. 17 of May 1992.

36. Conclusions of the Working Group meeting on enforcement of judgments, Preliminary Document No. 19 of November 1992.

37. Hague Conference on Private International Law: Final Act of the 17th Session, 32 I.L.M. 1134 (1993) [hereinafter Final Act].

38. Titles II and III, Draft Convention, *supra* note 33.

39. Arthur von Mehren, Minutes No. 3, Commission I, Seventeenth Session, Hague Conference on Private International Law, Meeting of 20 May 1993, at 1 (on file with the Cornell International Law Journal).

40. Art. 2, Draft Convention, *supra* note 33. Neither the Draft Convention nor the other judgment conventions define what legally constitutes "domicile." In fact, in the

in almost every country's law and every judgment treaty's jurisdiction section.<sup>41</sup> It does, however, raise federalism issues in its application to the United States. The article permits a plaintiff to sue a defendant in the latter's domiciliary jurisdiction. This raises a question in the United States: does "jurisdiction" mean federal or state court? Clearly a domiciliary is amenable to suit in federal court based on the diversity statute.<sup>42</sup> The Draft Convention is also applicable to state courts by means of the supremacy clause.<sup>43</sup> Thus, if the Draft Convention is signed and ratified, the federal government will vest a state court with jurisdiction the state court might not have under its constitution or long-arm statute.

The second jurisdiction base arises when "[a] person may be sued in a Contracting State"<sup>44</sup> for disputes involving contracts,<sup>45</sup> maintenance,<sup>46</sup> tort,<sup>47</sup> civil claims for criminal proceedings,<sup>48</sup> branch or agency opera-

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Lugano and Brussels Conventions, "[p]ersons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nations of that State." Art. 2, Lugano Convention, *supra* note 2; Art. 2, Brussels Convention, *supra* note 2. Thus, the rendering court uses its domestic law to resolve legal questions regarding domicile. The Inter-American Convention has similar language to that of the Draft Convention. Art. 1(A)(1), Inter-American Convention, *supra* note 2.

41. See, e.g., Art. 1, Brussels Convention, *supra* note 2.

42. "The district courts shall have original jurisdiction of all civil actions arising under the . . . treaties of the United States." 28 U.S.C. § 1331 (1988).

43. U.S. CONST. art. VI, cl. 2. A treaty is the equivalent of a federal statute by means of the supremacy clause: "[A]ll Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." *Id.*

44. Art. 5, Draft Convention, *supra* note 33. This language is different from the Lugano Convention's Article 5. The introductory language of the Lugano Convention is: "A person domiciled in a Contracting State may, in another Contracting State, be sued . . ." Art. 5, Lugano Convention, *supra* note 2. The change in the Draft Convention, by eliminating "domiciled in a Contracting State," implies that *any* defendant may be sued in any contracting state. This gives the Draft Convention a huge net in which to ensnare non-member state defendants and enforce judgments against them in member states' courts. In other words, this seems similar to the Brussels Convention jurisdictional framework that the United States hopes to change by proposing a new Convention.

The Draft Convention does not in Article 5 specifically list bases for jurisdiction. Rather, it notes in explanatory brackets: "Set out acceptable bases; these bases must be made available by all Contracting States." Art. 5, Draft Convention, *supra* note 33. It then proposes "for illustrative purposes" parts of the Lugano Convention, 1971 Hague Convention, and Inter-American Convention. *Id.* These illustrations conclude this sentence in the text. See *infra* notes 45-57 and accompanying text.

45. Art. 5(1), Lugano Convention, *supra* note 2. The place for the suit depends on the type of contract:

[I]n matters relating to a contract, in the courts for the place of performance of the obligation in question; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, this place shall be the place of business through which he was engaged[.]

*Id.*

46. Art. 5(2), Lugano Convention, *supra* note 2.

47. Art. 5(3), Lugano Convention, *supra* note 2. The suit is heard "where the harmful event occurred." *Id.*

48. Art. 5(4), Lugano Convention, *supra* note 2. This case is heard in the same forum as the criminal proceeding, if the court has proper jurisdiction. *Id.*

tions,<sup>49</sup> trusts,<sup>50</sup> cargo and freight salvage remuneration,<sup>51</sup> tangible movable property,<sup>52</sup> immovable property,<sup>53</sup> where the defendant did not challenge jurisdiction,<sup>54</sup> when the defendant was the plaintiff in a prior action regarding this issue in the forum,<sup>55</sup> if the forum was designated in a forum selection agreement,<sup>56</sup> and if no other forum is available.<sup>57</sup>

The third Draft Convention jurisdiction base establishes special jurisdiction for contractual areas. The areas are complex situations (multiple defendants, third-party defendants, and counterclaims),<sup>58</sup> insurance,<sup>59</sup> and particular consumer contracts.<sup>60</sup> The Draft Convention also has provisions for special situations, including vesting courts with exclusive jurisdiction,<sup>61</sup> prorogation of jurisdiction,<sup>62</sup> and the effects of a defendant's appearance in court.<sup>63</sup>

#### b. The "Grey Area"

Unlike a true *convention double*, however, the U.S. proposal allows contracting states to assume jurisdiction on bases of jurisdiction not listed or specified in the convention. Judgments resulting from the exercise of

49. Art. 5(5), Lugano Convention, *supra* note 2, and Art. 1A(3), Inter-American Convention, *supra* note 2. The suit is heard where the branch or agent is located.

50. Art. 5(6), Lugano Convention, *supra* note 2. Trust suits are heard in the trust's domicile.

51. Art. 5(7), Lugano Convention, *supra* note 2.

52. Art. 10(4), 1971 Hague Convention, *supra* note 2, and Art. 1B, Inter-American Convention, *supra* note 2.

53. Art. 10(3), 1971 Hague Convention, *supra* note 2, and Art. 1C, Inter-American Convention, *supra* note 2.

54. Art. 10(6), 1971 Hague Convention, *supra* note 2.

55. Art. 10(7), 1971 Hague Convention, *supra* note 2.

56. Art. 10(5), 1971 Hague Convention, *supra* note 2, and Art. 1D, Inter-American Convention, *supra* note 2.

57. Art. 2, Inter-American Convention, *supra* note 2. Article 2 states:

[R]equirements for jurisdiction in the international sphere shall also be deemed to be satisfied if, in the opinion of the judicial or other adjudicatory authority of the State Party in which the judgment is to be given effect, the judicial or other adjudicatory authority that rendered the judgment assumed jurisdiction in order to avoid a denial of justice because of the absence of a competent judicial or other adjudicatory authority.

*Id.*

58. Arts. 6 and 6A, Draft Convention, *supra* note 33. The Draft Convention references Articles 6 and 6A of the Lugano Convention, Article 11 of the 1971 Hague Convention, and Article 3 of the Inter-American Convention.

59. Arts. 7-12A, Draft Convention, *supra* note 33. The Draft Convention refers to Articles 8-12A of the Lugano Convention.

60. Arts. 13-15, Draft Convention, *supra* note 33. The Draft Convention refers to Articles 13-15 of the Lugano Convention.

61. Art. 16, Draft Convention, *supra* note 33. The Draft Convention references Article 16 of the Lugano Convention.

62. Art. 17, Draft Convention, *supra* note 33. The Draft Conventions references Article 17 of the Lugano Convention, Article 10(5) of the 1971 Hague Convention, and Article 1A(4) of the Inter-American Convention.

63. Art. 18, Draft Convention, *supra* note 33. The Draft Convention references Article 18 of the Lugano Convention, Article 10(6) of the 1971 Hague Convention, and Article 1A(4) of the Inter-American Convention.

such bases, known as the grey area, are not entitled to recognition under the convention, although the enforcing state may grant recognition and enforcement under its general law.<sup>64</sup>

It is this grey area which the United States hopes will ease acceptance of its proposal. The grey area facilitates compromise by permitting states to maintain their sovereignty by exercising black list jurisdiction if they so choose. Thus, countries will not have to forgo parts of their legal systems. Rather, they will know that judgments based on a black list basis will not be granted automatic recognition and enforcement. A *convention mixte*, therefore, provides flexibility for contracting states; such flexibility will help enable states to reach a final agreement.

### c. The "Black List"

The U.S. proposal also contains a black list of impermissible jurisdictional bases.<sup>65</sup> In offering to proscribe some long-arm (called "exorbitant"<sup>66</sup>) bases, the United States hopes to attract Hague Conference member states' attention. Just as the United States wants to eliminate the Brussels and Lugano provisions permitting jurisdiction over non-domiciled defendants,<sup>67</sup> so too do European countries want to end U.S. transient jurisdiction, also known as "tag" service (which is essentially the same as the European Conventions' exorbitant jurisdiction provisions).<sup>68</sup> Transient jurisdiction, or tag service, is the exercise of personal jurisdiction over a person present in the forum, thus entailing the in-state service of process on a defendant, no matter how temporary the in-state presence. Tag service has been used in the United States to exercise personal jurisdiction over foreign defendants, making them liable for enormous punitive damage awards.<sup>69</sup> Transient jurisdiction is not recognized outside of the United States and is criticized by most U.S. commentators.<sup>70</sup> The United

64. Art. 3, Draft Convention, *supra* note 33. The text of the "grey area":

Suits may further be instituted in a Contracting State by virtue of grounds not specified in Sections 1-6 of this Title [the "white list"] unless the ground in question is enumerated in Article 4 [the "black list"].

Where the court of origin's jurisdiction rests on [the paragraph above], the party that invoked jurisdiction is not entitled to seek recognition and enforcement of any resulting judgment under Title III of this Convention. *However, this Convention shall not affect the ability of a Contracting State to afford recognition and enforcement to such a judgment under its general law.*

*Id.* (emphasis added).

65. Art. 4, Draft Convention, *supra* note 33.

66. *Id.*

67. Art. 4, Brussels Convention, *supra* note 2; Art. 4, Lugano Convention, *supra* note 2. Both articles read: "Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to the nationals of that State."

68. The United States Supreme Court upheld the constitutionality of tag service (also known as transient jurisdiction) in *Burnham v. Superior Court of California*, 495 U.S. 604 (1990).

69. *See, e.g., Amusement Equipment, Inc. v. Mordelt*, 779 F.2d 264 (5th Cir. 1985).

70. The Restatements, for example, argue that transient jurisdiction for foreigners is rejected abroad and, therefore, should also not be allowed in the United States. "Jurisdiction based on service of process on one only transitorily present in a state is no



States Supreme Court, however, continues to uphold its constitutionality.<sup>71</sup>

The Draft Convention does not specifically state the black list bases. Instead, it refers to provisions of other conventions.<sup>72</sup> Article three of the Lugano Convention lists specific statutes from each contracting state which are forbidden bases of jurisdiction against contracting state defendants.<sup>73</sup> The Draft Convention rejects listing specific statutes as "inappropriate."<sup>74</sup> It proposes that "[i]nstead, each exorbitant basis would be set out in general terms."<sup>75</sup>

The Draft Convention then references a section of the 1971 Hague Convention's Supplementary Protocol<sup>76</sup> "for illustrative purposes."<sup>77</sup> Paragraph 4 of the Supplementary Protocol lists the following bases of jurisdiction as invalid: presence of defendant's property in the forum,<sup>78</sup> the plaintiff's nationality,<sup>79</sup> the plaintiff's domicile,<sup>80</sup> the occurrence of

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longer acceptable under international law if that is the only basis for jurisdiction and the action in question is unrelated to that state." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421, Reporters' Note 4 (1987). Section 421 codifies this summary of international law: "In general, a state's exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if, at the time jurisdiction is asserted[,] the person or thing is present in the territory of the state, other than transitively . . . ." *Id.* § 421(a).

71. "The short matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'" *Burnham v. Superior Court of California*, 495 U.S. 604, 619 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). *Burnham* involved a New Jersey defendant who was temporarily in California, the plaintiff's forum.

72. Art. 4, para. 4, Draft Convention, *supra* note 33.

73. *E.g.*, Articles 14 and 15 of the French Civil Code, Article 77 of the Iceland Civil Proceeding Act, and Article 99 of the Austrian Law on Court Jurisdiction. Art. 3, Lugano Convention, *supra* note 2.

74. Art. 4, para. 4, Draft Convention, *supra* note 33.

75. *Id.*

76. Supplementary Protocol to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1971 Hague Convention, *supra* note 2, at 125 [hereinafter Supplementary Protocol].

77. Art. 4, para. 4, Draft Convention, *supra* note 33.

78. Para. 4(a), Supplementary Protocol, *supra* note 76:

the presence in the territory of the State of origin of property belonging to the defendant, or the seizure by the plaintiff of property situated there, unless—  
-the action is brought to assert proprietary or possessory rights in that property, or arises from another issue relating to such property,  
-the property constitutes the security for a debt which is the subject-matter of the action[.]

*Id.*

79. Para. 4(b), Supplementary Protocol, *supra* note 76 ("the nationality of the plaintiff").

80. Para. 4(c), Supplementary Protocol, *supra* note 76 ("the domicile, habitual residence or ordinary residence of the plaintiff within the territory of the State of origin unless the assumption of jurisdiction on such a ground is permitted by way of an exception made on account of the particular subject-matter of a class of contracts").

defendant's business in the forum,<sup>81</sup> transient jurisdiction,<sup>82</sup> and the plaintiff's "unilateral" forum selection.<sup>83</sup> These are the "exorbitant" bases of jurisdiction that so vex both U.S. and non-U.S. defendants. An agreement to prohibit these bases would help unify global commercial legality and ease fears of malicious litigation.

#### d. Recognition and Enforcement Procedures

As in the Brussels and Lugano Conventions, recognition and enforcement in the Draft Convention is straightforward. A judgment existing on white list bases "shall be recognized in the other Contracting States."<sup>84</sup> As in the Brussels and Lugano Conventions, the enforcing court may choose not to enforce a seemingly valid judgment for public policy reasons.<sup>85</sup> As the purpose of the agreement is to simplify and to provide certainty in judgment recognition, the recognition and enforcement procedures need not be more complicated.

#### e. Effect on U.S. Law

The most important effect on U.S. law is that the United States must relinquish tag service on foreigners. Such a sacrifice is the carrot which is enticing the Europeans (and the Japanese and Canadians) to join the negotiations. The effect of this on a federal system (as in the United States) is unclear. For example, if a French defendant receives service in New York based on transient jurisdiction, a resulting default judgment could be enforced in New York but not in New Jersey. The New York enforcement is a matter of the state long-arm and enforcement statutes.<sup>86</sup>

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81. Para. 4(d), Supplementary Protocol, *supra* note 76 ("the fact that the defendant carried on business within the territory of the State of origin, unless the action arises from that business").

82. Para. 4(e), Supplementary Protocol, *supra* note 76 ("service of a writ upon the defendant within the territory of the State of origin during his temporary presence there").

83. Para. 4(f), Supplementary Protocol, *supra* note 76 ("a unilateral specification of the forum by the plaintiff, particularly in an invoice").

84. Art. 26, Draft Convention, *supra* note 33. The clause reads: "[A] judgment given in a Contracting State that rests on a jurisdictional basis provided for in Article 2, or in Articles 5-18, shall be recognized in the other Contracting States."

85. Art. 27, Draft Convention, *supra* note 33. The Draft refers to Article 27(1) of the Lugano Convention, which reads: "A judgment shall not be recognized: (1) if such recognition is contrary to public policy in the State in which recognition is sought[.]" Lugano Convention, *supra* note 2.

86. It is possible that the treaty could divest the states of their international long-arm jurisdiction. Congress could provide implementing legislation under the supremacy clause making the treaty the sole source of international jurisdiction. Congress has two choices in making this decision. First, it can make the Draft Convention the sole source of international jurisdiction, regardless of whether the defendant is the domiciliary of a signatory country. Second, it could make the Draft Convention controlling of state international jurisdiction only in regard to defendants of signatory countries. Where a defendant is not the domiciliary of a signatory country, state long-arm statutes would still apply. Choosing the latter option may induce some countries to sign the Draft Convention, thereby limiting their domiciliaries to Draft Convention jurisdiction bases and not to transient jurisdiction.

But enforcement in New Jersey against a foreign defendant would violate the "black list" transient jurisdiction provision. In order to resolve such anomalies, Congress could overturn *Burnham v. Superior Court*<sup>87</sup> and ban foreign (non-U.S. domiciliary) transient jurisdiction in the United States.

If the United States signs and ratifies a judgment agreement, it will be the first time Congress has exercised its Article IV constitutional power in this manner.<sup>88</sup> The entire body of the common law beginning with *Hilton v. Guyot*<sup>89</sup> will be valid with respect to judgments emanating from non-signatory countries. A new body of law regarding the interpretation of the new convention will develop. It is therefore very important that the negotiators pay attention to the United States Supreme Court's interpretations of the Hague Service Convention<sup>90</sup> and the Hague Evidence Convention.<sup>91</sup> The Court has interpreted both conventions as not being the exclusive methods required to effectuate, respectively, service of process or the taking of evidence abroad.<sup>92</sup> The Draft Convention must be written

87. *Burnham v. Superior Court of California*, 495 U.S. 604 (1990). See *supra* notes 68 and 71.

88. See *supra* note 4 and accompanying text.

89. *Hilton v. Guyot*, 159 U.S. 113 (1885).

90. Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163.

91. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231.

92. *Volkswagenwerk AG v. Schlunk*, 486 U.S. 694 (1988), held that U.S. plaintiffs may serve process on foreign defendants by serving their agents within the United States, rather than by complying with the Hague Service Convention's provisions regarding extraterritorial service. The Supreme Court in dicta stated that the Service Convention only provides the exclusive means for service *abroad*. "By virtue of the Supremacy Clause, U.S. Const. Art. VI, the Convention pre-empts inconsistent methods of process prescribed by state law in all cases to which it applies." *Id.* at 699. See also *Kadota v. Hosogai*, 125 Ariz. 131, 136, 608 P.2d 68, 73 (1980)

([A]ppellee's argument that her compliance with [Arizona] Rule [of Civil Procedure] 4(e)(6)(iii) was sufficient service of process on the appellant fails. The [Hague Service Convention] . . . specifically prohibits this method of service, although the Arizona rules allow for it. The law is clear that state statutes are abrogated to the extent that they are inconsistent with a treaty.).

Conflicting interpretations exist regarding article 19 of the Hague Service Convention. The Convention provides for each signatory country to have a Central Authority which coordinates foreign requests for service of process. Article 19 permits countries to allow service by methods legal in that country but not detailed in the Convention. Some courts have held that this article provides for valid service if such service is in accordance with the law of the state where service is made. See *Lemme v. Wine of Japan Import, Inc.*, 631 F.Supp 456, 462-63 (E.D.N.Y. 1986); *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 288 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981).

But other courts have disagreed and held that only the Service Convention's delineated service methods are valid means of serving process, regardless of foreign law. See *Teknekon Mgt. v. Quante Fernmeldtechnik*, 115 F.R.D. 175, 176 (D. Nev. 1987); *In re Anschuetz & Co.*, 754 F.2d 602, 615 (5th Cir. 1985), *vacated*, 107 S. Ct. 3223 (1987). The Convention's failure to specify in an article the Convention's exclusivity led to this ambiguity and differing interpretations.

Similar ambiguity exists in the application of the Hague Evidence Convention. In *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522 (1987), the Supreme Court held: "The text of the [Hague] Evidence Convention itself does not modify the law of any contracting State, require any contracting State to use the

so as to avoid being interpreted as non-exclusive. Such a result would leave foreign courts open to examining recognition and enforcement motions on their merits—the exact situation the United States hoped to avoid when it proposed the Convention. The use of specified white list and black list bases for jurisdiction must be clearly understood as either permissible or impermissible jurisdiction bases so that no post-ratification judicial interpretation negates the Draft Convention's purpose.

Another major effect on U.S. law is the federalization of state public policy exceptions to judgment enforcement. Ratification of the Draft Convention will bind the states by means of the supremacy clause.<sup>93</sup> Thus Article 27's public policy exception to recognition and enforcement will be a federal public policy exception. State public policy rationales, up to this point binding on federal courts,<sup>94</sup> will now be reviewable by federal courts. For over 200 years state public policy has been a matter of state prerogative; it will now be seized by the federal branches of government. It may behoove Congress to enact implementing legislation to ensure an easy transition to public policy exceptions.

## 2. *Current Status of Negotiations*

The United States proposed in May 1992 that the Hague Conference begin work on a Convention.<sup>95</sup> The Hague Conference's Secretary General had the Conference's Permanent Bureau develop a working document<sup>96</sup> describing the proposal. The Secretary General then asked the United States to submit a more extensive description of its proposal, which it did in June of 1992, including a skeleton draft.<sup>97</sup> The Special Commission of the Conference met in June 1992 and decided to submit the matter to a Working Group of experts.<sup>98</sup> This panel endorsed the idea at its November 1992 meeting.<sup>99</sup> The 17th Session of the Hague Conference took place in May 1993. The United States had hoped the Conference would place the proposed Convention on a priority track, but the delegates instead decided that the matter needed further study.<sup>100</sup>

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Convention procedures, either in requesting evidence or in responding to such requests, or compel any contracting State to change its own evidence-gathering procedures." *Id.*

93. U.S. CONST. art. VI, cl. 2. See *supra* note 4.

94. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that there is no federal common law in diversity cases).

95. Hague Conference document L.c. ON No. 15 (92), *supra* note 1.

96. Hague Conference document Prel. Doc. No. 17, *supra* note 35.

97. Hague Conference, Paper Submitted by the United States, *Another Hague Convention on Recognition and Enforcement of Foreign Judgments: New Approaches and New Opportunities*, September 1992 (on file with the *Cornell International Law Journal*).

98. Conclusions of the Special Commission of June 1992 on General Affairs and Policy of the Conference, Prel. Doc. No. 18 of August 1992 (on file with the *Cornell International Law Journal*).

99. Prel. Doc. No. 19, *supra* note 36.

100. Final Act, *supra* note 37, 32 I.L.M. at 1145. See also Minutes Nos. 3 and 4, May 21, 1993, Hague conference on Private International Law, Seventeenth Session, and Working Documents Nos. 7 and 8, May 20, 1993.

The Danish delegate, Mr. Philip, led the opposition. He argued that "before deciding whether [a new convention] was necessary and to what effect it would give rise to a clearer discussion concerning the necessity for such an instrument was required [sic]."101

He argued that the present regional system worked well but a multi-lateral or global system was a very different proposition and should only be taken cautiously, after consideration of all the advantages and disadvantages. Furthermore, although any convention covering these matters clearly needs to consider questions such as jurisdiction and "order publique" it should also allow consideration of the substance of judgements [sic] before requiring their recognition on a global basis. Therefore he considered that there were profound problems associated with the project and that it was too ambitious. He expressed a preference for a less ambitious project which would move step by step towards the end result suggested in [the U.S. proposal]. Each of the steps would allow a period of reflection and an assessment of the results before progressing to the next step. He suggested starting with consideration of exorbitant jurisdiction and using article 59 of the Brussels Convention as a starting point . . . . An ambitious plan such as that suggested in [the U.S. proposal] would, he thought, prove impossible.<sup>102</sup>

This argument had three points. First, that more study was necessary. The reference to existing multilateral judgment treaties indicated Denmark's contentment with the Brussels and Lugano Conventions. Second, the "order publique" refers to public policy exceptions. The Danes were probably concerned that an open-ended public policy exception would potentially spiral out of control. Third, the suggestion that "the substance of judgements" [sic] be discussed "before requiring their recognition on a global basis" referred to punitive damages. This must have been a hint to other delegates that the U.S. proposal would require signatory countries to enforce large U.S. damage awards. All three areas are of concern to various delegations and spurred them to proceed with caution.

The delegates decided not to place the U.S. proposal on a priority status. Instead, they approved a Danish suggestion that referred the proposal to a Special Commission "to study further the problems involved in drafting such a Convention, . . . to make proposals, . . . to suggest the timing of such work, and that the Special Commission on General Matters and Policy of the Conference make recommendations to the Eighteenth Session on further steps to be taken."<sup>103</sup> The United States was able to convince the delegates to amend one line of the Danish proposal. Instead of having the Special Commission "be called in 1994,"<sup>104</sup> it was to be "con-

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101. Mr. Philip, Minutes No. 3, *supra* note 100, at 2.

102. *Id.*

103. Working Document No. 7, Commission I, Seventeenth Session, General Affairs, Hague Conference on Private International Law, May 5, 1993 (on file with the *Cornell International Law Journal*).

104. *Id.*

stituted as soon as feasible.”<sup>105</sup> The United States failed to convince the delegates to speed the Special Commission when the delegates refused to have the Special Commission on General Matters and Policy of the Conference make its recommendations prior to the Eighteenth Session.<sup>106</sup> The Convention proposal is still alive, but its expected completion date has been extended from 1996 to 1998.<sup>107</sup>

## II. Reynolds v. The International Amateur Athletic Federation

### A. Background

Harry L. (Butch) Reynolds, Jr. is the 400 meter run world record holder.<sup>108</sup> He placed second in the 1988 Olympic Games.<sup>109</sup> On August 12, 1990, he competed in the Herculis '90 International track and field competition in Monte Carlo, Monaco.<sup>110</sup> After competing, he was asked to submit a urine sample as part of the IAAF's drug-testing program.<sup>111</sup> Reynolds's sample was sent with others to the Lafage Laboratory in Paris, France. Reynolds was informed that his sample tested positive for nandrolone, a banned performance-enhancing anabolic steroid.<sup>112</sup> Reynolds was summarily suspended from competing for two years, a time period which included the 1992 Olympics.<sup>113</sup> Reynolds immediately submitted a sample to another laboratory, which tested negative for any banned substances.<sup>114</sup> The IAAF denied Reynolds's appeals.<sup>115</sup>

### B. Legal Action

#### 1. *Reynolds I*

Reynolds was forced to take legal action to regain his competitive status.<sup>116</sup> Even though he was able to prove the French lab had mixed up the sam-

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105. Working Document No. 8, Commission I, Seventeenth Session, General Affairs, May 5, 1993, Hague Conference on Private International Law (on file with the *Cornell International Law Journal*).

106. See Minutes No. 4, Commission I, Seventeenth Session, General Affairs, Hague Conference on Private International Law, Meeting of May 20, 1993, at 5 (on file with the *Cornell International Law Journal*). The vote defeating the U.S. amendment was 15 against, 12 in favor, and 5 abstentions. *Id.* See also Working Document No. 7, *supra* note 103, and Working Document No. 8, *supra* note 105.

107. Final Act, *supra* note 37.

108. Reynolds set the world record in Zurich in 1988 with a time of 43.29 seconds. John Goodbody, *US Court awards Reynolds record damages of Pounds 17m*, TIMES, Dec. 4, 1992, available on LEXIS, News Library, Curnws File.

109. *Id.*

110. *Id.*

111. The IAAF is the international governing body for track and field. See *supra* note 6. Drug testing in this context means for steroids (performance enhancements).

112. *Reynolds II*, 841 F.Supp. 1444, 1447 (S.D. Ohio 1992).

113. See *Reynolds Out of Money, Out of Races*, *supra* note 7.

114. *Id.*

115. *Id.*

116. His original suit, *Reynolds v. The Athletics Congress*, No. C-2-91-0003 (S.D. Ohio 1991), was dismissed for lack of subject-matter jurisdiction. 1991 U.S. App. LEXIS 12277 (6th Cir. June 11, 1991) (per curiam). *Reynolds II* arose from his suit to compete in the U.S. Olympic Trials and to receive monetary damages.

ples, his protestations were ignored. The IAAF refused to admit it had made a mistake.

Reynolds lost endorsement and prize money with each missed competition.<sup>117</sup> Getting nowhere with the IAAF's adjudicatory process, Reynolds turned to the U.S. courts. He sued in federal district court in Ohio, seeking reinstatement for Fifth Amendment due process violations by the IAAF.<sup>118</sup> The court dismissed his Fifth Amendment claim for lack of jurisdiction and his other claims were stayed pending compliance with the Amateur Sports Act.<sup>119</sup> The Sixth Circuit affirmed the Fifth Amendment claim dismissal and vacated the stay on lack of subject matter jurisdiction grounds,<sup>120</sup> forcing the suit's complete dismissal.

## 2. *Reynolds II*

With the U.S. Olympic Trials rapidly approaching, Reynolds returned to court. The district court issued a temporary restraining order on June 19, 1992, forbidding TAC or the IAAF from preventing Reynolds's competing in the Trials.<sup>121</sup> The Sixth Circuit reversed the district court later that day.<sup>122</sup> But Supreme Court Justice John Paul Stevens, sitting as Circuit Justice, reversed the Sixth Circuit on June 20.<sup>123</sup> The full Supreme Court denied TAC's same day appeal.<sup>124</sup>

Reynolds won his heat and qualified in the semi-final for the final. He placed fifth, however, and was awarded a spot as an alternate on the 4X400 relay team.<sup>125</sup> The International Olympic Committee (IOC) announced that it would not allow Reynolds to run in Barcelona.<sup>126</sup> Reynolds chose not to test the IOC. The IAAF extended Reynolds's ban, set to expire the day after the Olympics, through the end of 1992. Reynolds had contracts to run in Europe and stood to lose a great deal of money.

Reynolds then returned to court to adjudicate his breach of contract and damages claims, which he increased as a result of the ban's extension. The IAAF refused to appear, claiming it was not subject to the jurisdiction of any court in the world.<sup>127</sup> On December 3, 1992, Judge Kinneary of the U.S. District Court for the Southern District of Ohio found for Reynolds and awarded him \$6 million in compensatory damages and \$18 million in trebled punitive damages.<sup>128</sup> The IAAF announced its intention to appeal

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117. Reynolds estimated he lost a total of \$4-5 million. For example, Nike refused to continue its sponsorship contract. See *Reynolds II*, 841 F. Supp. at 1451.

118. See *Reynolds*, No. C-2-91-0003.

119. *Id.*

120. *Reynolds*, 1991 U.S. App. LEXIS 12277.

121. *Reynolds II*, *supra* note 9.

122. *Reynolds v. Int'l Amateur Athletic Fed'n*, No. 92-3596, 1992 U.S. App. LEXIS 14058, at \*6 (6th Cir. 1992).

123. *Reynolds v. Int'l Amateur Athletic Fed'n*, 112 S.Ct. 2512 (1992).

124. *Reynolds v. Int'l Amateur Athletic Fed'n*, 120 L. Ed. 864 (1992).

125. Moore, *supra* note 10.

126. *Reynolds II*, 841 F. Supp. at 1444.

127. See Moore, *supra* note 10.

128. *Reynolds v. International Amateur Athletic Fed'n*, No. C-2-92-456 (S.D. Ohio Nov. 1992) (judgment award).

but could only litigate the jurisdiction issue, as it waived any other defenses in refusing to defend.<sup>129</sup> Primo Nebiolo, the IAAF president, announced that "Reynolds will never collect. Never, never. He can live 200 years."<sup>130</sup> Reynolds responded by winning a world championship in July.<sup>131</sup>

### 3. *Enforcement/Garnishment*

Reynolds, not deterred, received a garnishment order from the rendering court, and set out to enforce his judgment in the United States.<sup>132</sup> The IAAF does not have assets in the United States, but it does have sponsors who pay quarterly dues to the IAAF. Reynolds attempted to garnish those dues.<sup>133</sup> His initial attempt was successful when, in August 1993, a district court judge ordered Mobil Oil to pay \$691,667 to the court to hold in escrow pending appeal.<sup>134</sup>

### 4. *Reversal for Lack of Jurisdiction*

The U.S. Court of Appeals for the Sixth Circuit reversed Reynolds's district court victory and remanded for dismissal.<sup>135</sup> The Court held that Ohio had no jurisdiction over the IAAF.<sup>136</sup> The United States Supreme Court denied certiorari.<sup>137</sup> Just as Nebiolo claimed,<sup>138</sup> the IAAF proved beyond the reach of U.S. law.<sup>139</sup>

129. *Reynolds wins \$700,000 judgment*, ITHACA JOURNAL, Aug. 28, 1993, at B1.

130. Kirshenbaum, *supra* note 14.

131. *Id.*

132. ITHACA JOURNAL, *supra* note 129.

133. See *Reynolds Out of Money, Out of Races*, *supra* note 7.

134. Randy Harvey, L.A. TIMES, Aug. 28, 1993, at C2. The payment was Mobil Oil's May 21-August 27 quarterly dues. John Barron & Dick Patrick, *Sprinter Reynolds grabs gold on and off the track*, USA TODAY, Aug. 30, 1993, at 11C. Appearing with Reynolds on *Larry King Live*, Reynolds's attorney John Gall said that Reynolds eventually garnished \$1.4 million. *Larry King Live* (CNN television broadcast, Feb. 14, 1994), transcript # 1043-2, available in LEXIS, News Library, Curnws File.

Mars "escaped judgment . . . arguing that its sponsorship agreement [with the IAAF] was entered into by its subsidiary in the United Kingdom." Harvey, *supra*. Nike, Pepsi-Cola, and Coca-Cola "had already paid their sponsorship money to the IAAF and, thus, Reynolds could not intercept that money." *Id.*

135. *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110 (6th Cir. 1994), *reh'g en banc denied*, No. 93-3884, 1994 U.S. App LEXIS 16815 (6th Cir. 1994).

136. This Note will not review U.S. jurisdiction law. For an easy to read summary of U.S. law and the law of other countries, see Joseph J. Simeone, Essay, *The Recognition and Enforceability of Foreign Country Judgments*, 37 ST. LOUIS U. L.J. 341 (1993).

137. *Reynolds v. International Amateur Athletic Fed'n*, 115 S. Ct. 423 (1994).

138. See *Reynolds II*, 841 F. Supp. 1444, 1452 (S.D. Ohio 1992), for the IAAF's judgment claims.

139. For discussions of the various *Reynolds* cases, see 6th Circuit Opinion Notes, 73 MICH. B.J. 710-11 (July 1994); Anthony T. Polvino, Comment, *Arbitration as Preventative Medicine For Olympic Ailments: The International Olympic Committee's Court of Arbitration For Sport and the Future For the Settlement of International Sporting Disputes*, 8 EMORY INT'L L. REV. 347 (1994); Jill J. Newman, Note, *The Race Does Not Always Go to the Stronger or Faster Man . . . But to the One Who Goes to Court! An Examination of Reynolds v. International Amateur Athletic Fed'n*, et al., 1 SPORTS LAW. J. 205 (1994); Hilary Joy Hatch, Note, *On Your Mark, Get Set, Stop! Drug-Testing Appeals in the International Amateur Athletic Federation*, 16 LOY. L.A. INT'L & COMP. L.J. 537 (1994); Nelson, *supra* note 8.



The court of appeals held that under Ohio's long-arm statute, the district court did not have personal jurisdiction over the IAAF.<sup>140</sup> Its analysis followed three avenues. First, the court held that the IAAF did not transact business in Ohio, thereby avoiding Reynolds's contract claim. The court noted that "[e]ven if the IAAF purposefully availed itself of Ohio privileges, the claims against the IAAF must arise out of the IAAF's activities in Ohio."<sup>141</sup> The IAAF's actions all arose outside of Ohio: the drug test was administered in Monaco and tested in France, all IAAF press releases were issued from the United Kingdom, and all correspondence to Reynolds was sent from the United Kingdom. All told, "the IAAF is based in England, owns no property and transacts no business in Ohio, and does not supervise U.S. athletes in Ohio or elsewhere. Its contacts with Reynolds in Ohio are superficial, and are insufficient to create the requisite minimum contacts for personal jurisdiction."<sup>142</sup> Finally, the court of appeals found no evidence of an actual contract "made, performed, or breached in Ohio."<sup>143</sup> Therefore the court of appeals found that jurisdiction did not exist under Ohio's "transacting any business" section of its long-arm statute.

Second, the court of appeals held that the Ohio section regarding jurisdiction based on tortious injury was also insufficient to gain jurisdiction over the IAAF. To achieve jurisdiction based on tortious injury, the IAAF must have had minimum contacts with Ohio.<sup>144</sup> In short, the court found that the IAAF's actions neither occurred in Ohio nor were intentionally directed to have effect in Ohio.<sup>145</sup>

Finally, the court held that Reynolds could not gain personal jurisdiction over the IAAF based on TAC's agency status. The court early in its opinion said "we agree with the district court that TAC is an agent of the IAAF."<sup>146</sup> But the court of appeals found that TAC, although acting as the

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140. 23 F.3d at 1115-21.

141. *Id.* at 1116-17.

142. *Id.* at 1119.

143. *Id.*

144. *Id.*

145. *Id.* at 1120. The court of appeals looked to *Calder v. Jones*, 465 U.S. 783 (1984), for guidance concerning minimum contacts.

We find *Calder* distinguishable for several reasons. First, the press release concerned Reynolds's activities in Monaco, not Ohio. Second, the source of the controversial report was the drug sample taken in Monaco and the laboratory testing in France. Third, Reynolds is an international athlete whose professional reputation is not centered in Ohio. Fourth, the defendant itself did not publish or circulate the report in Ohio; Ohio periodicals disseminated the report. Fifth, Ohio was not the "focal point" of the press release. The fact that the IAAF could foresee that the report would be circulated and have an effect in Ohio is not, in itself, enough to create personal jurisdiction. Finally, although Reynolds lost Ohio corporate endorsement contracts and appearance fees in Ohio, there is no evidence that the IAAF knew of the contracts or of their Ohio origin. *Calder* is a much more compelling case for finding personal jurisdiction.

(citation omitted). 23 F.3d at 1120.

146. *Id.* at 1118.

IAAF's agent, did not subject the IAAF to personal jurisdiction.<sup>147</sup> The court noted that the IAAF did not waive its personal jurisdiction defense by failing to appear, because it did not authorize TAC to appear on its behalf.<sup>148</sup> TAC predicated its intervention, which began when Reynolds moved for the temporary restraining order enabling him to enter the U.S. Olympic Trials in 1992, on the grounds that "it was required to uphold IAAF regulations, and contended that 'TAC, a member of the IAAF . . . is bound by the decision declaring plaintiff ineligible; and thus under the Amateur Sports Act, TAC may not permit him to participate in the Olympic Trials.'"<sup>149</sup> The court decided that TAC operated on its own volition, even though "it was required to uphold IAAF regulations." What the court failed to note is that it was the IAAF that required TAC to uphold the IAAF regulations, because TAC is a member of the IAAF.

If the court's rationale were applied in a typical business context, foreign corporations with agents or subsidiaries in the United States would always be immune from jurisdiction as long as the parent company could establish that it did not conduct any business in the forum and did not direct the legal activities of its U.S. representative. That is exactly what the IAAF has done, and the court let it succeed in escaping jurisdiction. The court argued that "[t]here is no indication that the IAAF authorized or even requested TAC to appear,"<sup>150</sup> but rather that TAC instead "was carrying out its statutory duty under the Amateur Sports Act and was not acting as the IAAF's agent when it intervened."<sup>151</sup> This argument fails to realize that TAC's sole existence is to serve as the IAAF's U.S. representative. As TAC was "required to uphold IAAF regulations," it did not need an explicit instruction from the IAAF to intervene.

In concluding, the court said "we do not believe that holding the IAAF amenable to suit in Ohio court under the facts of this case comports with 'traditional notions of fair play and substantial justice.'"<sup>152</sup> The IAAF does not use "fair play and substantial justice" when dealing with its athletes, and the court was wrong to condone such behavior.

### III. Could Reynolds Enforce Under the Proposed Hague Convention?

Reynolds sought to enforce his award only in the United States because foreign countries, particularly European countries,<sup>153</sup> frown upon sizeable U.S. punitive damage awards. To complete his enforcement, Reynolds potentially could have sought garnishment from the Atlanta Committee

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147. *Id.* at 1121.

148. *Id.*

149. *Id.*

150. *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110 (6th Cir. 1994), *reh'g en banc denied*, No. 93-3884, 1994 U.S. App. LEXIS 16815 (6th Cir. 1994).

151. *Id.*

152. *Id.* (quoting *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113 (1987)).

153. See generally ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND ARBITRATION* 420-56 (1993).

for the Olympic Games (ACOG), the IOC, and the USOC (all are sponsors of the IAAF for the 1996 Olympics).<sup>154</sup>

Reynolds would not have had to threaten the 1996 Olympic Games if he could have enforced his full judgment abroad. Several U.S. IAAF sponsors avoided garnishment by paying the IAAF through foreign subsidiaries. Also, the IAAF has several non-United States sponsors Reynolds could have garnished. Furthermore, the IAAF has assets abroad.<sup>155</sup> If the United States was a party to a comprehensive judgment treaty, Reynolds could have pursued his claim more efficiently and effectively. The draft Hague Convention, however, would not necessarily have permitted Reynolds to enforce his award abroad.

#### A. Jurisdiction

For Reynolds to be able to enforce his award in a Draft Convention contracting state, the jurisdiction of his judgment award must rest on a white list jurisdictional basis.<sup>156</sup> Assuming the court must be able to exercise jurisdiction over the defendant based on statutory or constitutional grant of authority (and is not granted jurisdiction by the effect of the Draft Convention as a federal statute), the district court must look to the Ohio long arm statute<sup>157</sup> to gain personal jurisdiction over the IAAF. It must do so because Reynolds sued the IAAF, a nonresident defendant, in federal court based on diversity jurisdiction.<sup>158</sup>

There appear to be only two white list bases available to Reynolds under the Ohio long-arm statute. The first basis is contract. Article 5(1) of the Lugano Convention<sup>159</sup> states that "the courts for the place of performance of the [contract] obligation in question" have jurisdiction.<sup>160</sup> While Reynolds was not officially under contract from the IAAF, he was required to adhere to its rules.<sup>161</sup> In return for such adherence, the dis-

154. See Rodda, *supra* note 6.

155. *Reynolds II*, 841 F. Supp. 1444, 1451 (S.D. Ohio 1992).

156. For a description of white list jurisdiction, see *supra* part I.B.1.a.

157. Ohio Rev. Code Ann. § 2307.382 (Anderson 1991). Reynolds sued in Ohio because that is his residence.

158. *Reynolds II*, 841 F. Supp. at 1449. See also 28 U.S.C. § 1332(a) (1988) (vesting federal courts with original jurisdiction in diversity of citizenship cases) and *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (federal courts sitting in diversity jurisdiction apply state substantive law).

159. The Draft Convention refers to parts of the Lugano Convention, the 1971 Hague Convention, and the Inter-American Convention for its white list. Title II, Draft Convention, *supra* note 33. See *supra* part I.B.1.a.

160. Art. 5(1), Lugano Convention, *supra* note 2.

161. "Competition under I.A.A.F. rules is restricted to amateur athletes who are under the jurisdiction of a [recognized national track and field organization (e.g., TAC)], and who are eligible to compete under I.A.A.F. rules." Rule 52, Restriction of Competition to Amateurs, IAAF OFFICIAL HANDBOOK, *supra* note 6, at 52. In order to compete in the Olympics, an athlete "must comply with the Olympic Charter as well as with the rules of the IF [International Federation] as approved by the IOC . . ." Rule 45, Eligibility Code, OLYMPIC CHARTER, *supra* note 6, at 58. A U.S. track and field athlete also must be a member of TAC. As a national governing body, TAC has the exclusive authority to "designate individuals and teams to represent the United States in international amateur athletic competition (other than the Olympic Games and the

strict court found that a contractual basis existed between Reynolds and the IAAF because the "IAAF makes eligibility determinations with respect to Ohio athletes—including Mr. Reynolds,"<sup>162</sup> and as a result, the IAAF "arguably enters into a contractual relationship with those athletes."<sup>163</sup> The court cited as evidence of this relationship Reynolds's receipt of money for travel to IAAF competitions and the fact that the IAAF "also receives substantial monies from the broadcast of its meets."<sup>164</sup> Thus, the "place of performance for the obligation in question"<sup>165</sup> is Ohio because that is where both parties receive their benefits of the contractual relationship.<sup>166</sup>

The second white list basis for jurisdiction over the IAAF in Ohio is tort. Article 5(3) of the Lugano Convention places the adjudication of a tort "where the harmful event occurred."<sup>167</sup> The Ohio long-arm statute permits jurisdiction over a person who causes "tortious injury by an act or omission in this state."<sup>168</sup> The district court found tort jurisdiction over the IAAF because its public suspension of Reynolds was defamatory and interfered with Reynolds's endorsement contracts.<sup>169</sup> Commission of a tort in the forum granted the court jurisdiction to hear the case.

Contract and tort are the only white list bases available to Reynolds under the Draft Convention.<sup>170</sup> The only other possible bases are branch or agency operations and when the defendant does not challenge jurisdiction. The Lugano and Inter-American Conventions provide the forum for

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Pan-American Games). . . ." 36 U.S.C. § 393 (1988). The USOC "exercise[s] exclusive jurisdiction . . . over all matters pertaining to the participation of the United States in the Olympic Games and in the Pan-American Games." 36 U.S.C. § 374 (1988).

162. *Reynolds II*, 841 F. Supp. at 1451.

163. *Id.*

164. *Id.*

165. Art. 5(1), Lugano Convention, *supra* note 2.

166. This "place of performance" basis is the only Article 5(1) contract basis that Reynolds could use to establish personal jurisdiction over the IAAF in Ohio. The other basis involves an individual employment contract. The situs for suit is either "where the employee habitually carries out his work," or if there is no habitual place in one country, then "this place shall be the place of business through which he was engaged." *Id.* There is no actual employment contract between Reynolds and the IAAF or TAC, only his required compliance with their rules and regulations. See *supra* note 161. Reynolds had no habitual place where he ran because the competitions were held in different locations around the world. The default rule to this is also not applicable because "the place of business" where Reynolds was "engaged" must have been either the IAAF's headquarters in London or TAC's headquarters in Louisville, Kentucky. It was at these headquarters where Reynolds's eligibility was determined and money was disbursed. The place of business cannot be Ohio because Reynolds's job—running—took place in the countries where the competitions were held.

167. Art. 5(3), Lugano Convention, *supra* note 2. See *supra* note 47.

168. Ohio Rev. Code Ann. § 2307.382(A)(3) (Anderson 1991).

169. The court held: "The uncontroverted allegations of defamation and interference with business relationships both make out a prima facie case that the IAAF has committed a tortious act which has injured an Ohio resident, and it must reasonably have been expected to do so." *Reynolds II*, 841 F. Supp. at 1451.

170. For an enumeration of white list bases, see *supra* part I.B.1.a.

a branch or agency suit at the location of the branch or agency.<sup>171</sup> TAC is not located in Ohio. As for the defendant not challenging jurisdiction, the Ohio long-arm statute does not provide this as a basis for jurisdiction.<sup>172</sup>

The court of appeals held that the IAAF's actions were not directed at Ohio, and therefore Reynolds could not use the Ohio long-arm statute to gain jurisdiction over the IAAF. But the Draft Convention overcomes this problem. By signing the Draft Convention, other countries consent to the exercise of white list jurisdiction bases over their citizens. The Draft Convention therefore could be seen as weakening the strictness of contact required by the court of appeals. The district court's findings of IAAF action in Ohio would be enough action to satisfy the Draft Convention.

Although jurisdiction over the IAAF is possible under the Ohio long-arm statute and under the white list, the exercise of jurisdiction must also comport with due process.<sup>173</sup> If the district court hears the case based on diversity jurisdiction, then the due process test is found in the 14th Amendment.<sup>174</sup> Its mandate requires the IAAF to have minimum contacts with the forum and that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."<sup>175</sup> The district court found no due process violations.<sup>176</sup>

Jurisdiction under the Draft Convention may require a Fifth Amendment due process test because the Draft Convention would have the same effect as a federal statute. It is also possible that because this is a treaty, there may not be a due process problem for contracting state defendants. But there may be such a problem for non-contracting state defendants caught in an exorbitant jurisdiction web.

## B. Recognition and Enforcement

Reynolds should be able to enforce his judgment in contracting states. His judgment comports with Draft Convention Article 26 in that it rests on "a jurisdictional basis provided for in . . . Articles 5-18."<sup>177</sup> In fact, Reynolds's judgment rests on two bases, the contract and tort bases.

Article 26 uses mandatory language that helps Reynolds. The article says that a judgment founded on an approved basis "*shall* be recognized in the other Contracting States."<sup>178</sup> Also, Article 29 prohibits *revision au fond*.<sup>179</sup> Thus, there is only one exception that would permit a contracting

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171. Art. 5(5), Lugano Convention, *supra* note 2, and Art. 1A(3), Inter-American Convention, *supra* note 2.

172. See Ohio Rev. Code Ann. § 2307.382 (Anderson 1991).

173. *International Shoe v. Washington*, 326 U.S. 310 (1945).

174. *Id.*

175. *Id.* at 316.

176. *Reynolds II*, 841 F. Supp. at 1453.

177. Art. 26, Draft Convention, *supra* note 33.

178. *Id.* (emphasis added).

179. Revision on the merits. Art. 29, Draft Convention, *supra* note 33. The Draft Convention refers for "illustrative purposes" to Article 29 of the Lugano Convention and Article 8 of the 1971 Hague Convention. *Id.*

state to refuse to enforce the judgment: public policy. Article 27(1) permits contracting states to refuse to enforce judgments based on a domestic rationale.<sup>180</sup> It is this exception that Western European courts have used to bar enforcement of large U.S. punitive damage awards.<sup>181</sup> But the Article 29 prohibition should protect U.S. judgments in similar actions. The United States could ensure protection of its judgments by limiting the public policy exceptions permitted in the Draft Convention.

### C. Punitive Damages

A core aspect to U.S. adoption of the Draft Convention must include European (and global) willingness to enforce large U.S. punitive damage awards. To achieve the successful completion of the Draft Convention, the United States must compromise and accept some limit on the size of these awards if it expects its negotiating partners to accept the enforcement of any punitive damage award. There are three possible solutions.

First, there could be an absolute cap on the total amount of punitive damages available for enforcement. This could be determined by a flat percentage. For example, only 25% of punitive damage awards in excess of \$100,000 may be enforced. This is not an acceptable solution, however, as it unfairly limits plaintiffs who deservingly hold very high awards. For example, Reynolds had \$18 million in punitive damages. That is a large amount, but it is only three times his compensatory damages. The IAAF deserves to be punished for its outrageous conduct, and foreign countries should participate in enforcing this punishment.<sup>182</sup> Any set amount would also soon become superseded by inflation.

Second, there could be a scale based on the amount of the punitive damage. For example, a plaintiff could collect 50% of the first million dollars, 25% of the second, 12.5% of the third, and so forth. Reynolds would thus collect about \$999,992.18 in punitive damages. As shown by Reynolds's \$17 million hit, this plan would severely reduce large U.S. awards enforceable abroad. This plan eliminates the problem of the cap, but it still may succumb to inflationary pressures. To compensate for that risk, the base amounts could be indexed either to a global inflation rate or the inflation rate of either the rendering state or the enforcing state.

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180. Art. 27(1), Draft Convention, *supra* note 33. The Draft Convention refers for illustrative purposes to Article 27(1) of the Lugano Convention and Article 5(1) of the Hague Convention. *Id.*

181. See *Solimene v. B. Grauel & Co.*, [1989] RIW 988 (Federal Republic of Germany court refused to enforce a \$275,000 punitive damage claim because judgment rendered by a jury (in Massachusetts) and similar cases are tried in Germany before a judge, German and U.S. product liability laws are different, and the size of the award was higher than a German court could grant); *S.A.C. Inc. v. F. & J.*, 52 BGHZ 31 (1970) (German court held a New York court did not have jurisdiction to hear counterclaim).

182. All countries have an interest in reigning in the IAAF's seemingly omnipotent power. Several athletes have followed Reynolds's lead and challenged doping suspensions in their home courts. See Iain Macleod, *Drugs in Sport*, DAILY TELEGRAPH, Dec. 13, 1994, at 32.

Third, a Hague Conference panel could determine the proper punitive damage award based on a range of factors. The factors could include the nature of the damage suffered, the extent of pain and suffering incurred, prospects for rehabilitation, future medical expenses, punishment of the defendant, the plaintiff's pre-harm financial condition, the defendant's pre-harm financial condition, and the plaintiff's cost of living and inflation rate. Binding arbitration before the International Chamber of Commerce could be the exclusive appeal from the panel.

Two enforcement questions remain. First, can the plaintiff enforce as fully as possible in the rendering country and thus avoid limiting the size of the award? That is, could Reynolds gain jurisdiction over the IAAF by either the Ohio long-arm statute or the white list and only enforce in the United States, thereby avoiding a punitive damages cap? He could enforce as he tried by garnishing IAAF dues and attack the Atlanta Olympics by garnishing in 1996. Second, can the plaintiff, if he must enforce under a cap scheme as outlined above, enforce the maximum allowed in each country, or will he be given one chance in one country only? The answer to both questions should be to allow the plaintiff to collect as much of the award as easily as possible.

## Conclusion

Any judgment treaty the United States signs must permit the enforceability of a *Reynolds*-type judgment. Such a judgment involves an innocent U.S. plaintiff maliciously harmed by a non-U.S. defendant which insists it is immune from judicial authority. The United States needs a judgment convention which will protect its citizens from such defendants. The Draft Convention meets this requirement. Under the Draft Convention, Reynolds has jurisdiction in the United States over the IAAF. He therefore has the power to force foreign courts to recognize and enforce his judgment. If Reynolds had begun his suit with the ability easily to enforce his judgment, the IAAF probably would not have been so obstructionist. A settlement could have been reached, thereby avoiding any threats to the international athletic competition—and in particular the 1996 Olympic Games. It will be a shame if the Atlanta Games are hindered by a garnishment order invoked by another of its star athletes for mistreatment by his federation.

It will be a further shame if the Draft Convention is not enacted. United States plaintiffs deserve to be treated fairly in international litigation. The United States must use pressure, if need be, to convince other countries to enact the Draft Convention. The greatest means of pressure is to return to *Hilton v. Guyot* jurisprudence and have U.S. courts no longer enforce foreign judgments where the rendering court will conduct a merit review of a U.S. judgment. The threat of equal enforcement treatment hopefully will be enough of a threat to spur the completion and ratification of the Draft Convention by Hague Conference member states. Only

when that occurs will U.S. plaintiffs be given their rightful treatment in the global legal system.



